

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

MARY KINGSLEY,

Appellant,

v.

RICHARD McDONALD,

Respondent.

DOCKET NUMBER WD76783

Date: April 29, 2014

Appeal from:
Jackson County Circuit Court
The Honorable Edith Messina, Judge

Appellate Judges:
Division Two: Victor C. Howard, P.J., Alok Ahuja and Gary D. Witt, JJ.

Attorneys:
Glenn E. Bradford, Kansas City, MO, for appellant.
Brian M. Bartalos, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

MARY KINGSLEY

Appellant,

v.

RICHARD McDONALD,

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Jackson County

Appellant Mary Kingsley and Respondent Richard McDonald were involved in an automobile accident on January 3, 2008. Kingsley filed suit to recover for her personal injuries on December 28, 2012, less than a week before the running of the five-year statute of limitations. § 516.120, RSMo.

Kingsley's petition originally named James McDonald, owner of the vehicle Richard McDonald was driving, as the defendant, rather than Richard McDonald. Although Kingsley's original petition names James rather than Richard McDonald as the defendant, the substantive allegations of the petition make clear that Kingsley intended to sue the person who operated the vehicle with which hers collided.

Kingsley amended her petition on January 19, 2013 – outside the limitations period – to name Richard McDonald as the defendant. On January 25, 2013, an insurance representative who had discovered the lawsuit called James, and informed him that a lawsuit had been filed naming him as the defendant, but that it had since been amended to name Richard instead. James called Richard on the same day, and told him of the lawsuit, and that Kingsley's petition had been amended to name Richard as the sole defendant.

The trial court dismissed the amended petition with prejudice, finding that Kingsley's claims against Richard McDonald were time-barred. Kingsley appeals.

REVERSED.

Division Two holds:

Under Supreme Court Rule 55.33(c), an amended petition naming a new defendant relates back to the date on which an original petition was filed, if the claims in the amended petition “arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading,” and if, within the period allowed for service of process, “the party to be brought in by

amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."

Each of the conditions specified in Rule 55.33(c) is satisfied here. The allegations of the amended petition are substantively identical to Kingsley's original petition, other than the substitution of Richard for James McDonald. And Richard received notice, within thirty days of the filing of the original petition and the running of the statute of limitations, (a) that the action had been filed, and (b) not only that he *should have been* named as the defendant, but that he *had been* named as the defendant. Richard does not allege that his defense of the action was prejudiced in any way by the delay in naming him. The circumstances here fall squarely within Rule 55.33(c)'s relation-back rule.

Richard argues that, even if Kingsley meets the express requirements of Rule 55.33(c), she is not entitled to rely on the relation-back doctrine because she knew Richard's identity as the driver (from a police report and other documents in her possession) before filing her original petition. We disagree. This is not a case in which Kingsley chose to name other defendants, but not Richard, based on a tactical decision; she does not seek to *add* a defendant, but instead to *substitute* the correct defendant for one she named erroneously. The focus of Rule 55.33(c) is on the timing of the notice *to the defendant* of the plaintiff's claims, and whether the defendant will be prejudiced by any delay in naming him. The relation-back inquiry is not affected by the plaintiff's knowledge of the correct defendant's identity before originally filing suit, or the plaintiff's level of diligence in attempting to avoid, discover, or correct the error in its original pleading.

Before: Division Two: Victor C. Howard, P.J., and Alok Ahuja and Gary D. Witt, JJ.

Opinion by: Alok Ahuja, Judge

April 29, 2014

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